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Issue Date: 19 March 2004

CASE NO.: 2000-LHC-00209
2003-LHC-00161

OWCP NO.: 01-145307

In the Matter of

RAYMOND, F. GERTE,
Claimant

v.

LOGISTEC OF CONNECTICUT, INC.,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
Carrier

ROGER LOWLICHT, DDS,
Party-in-Interest

Appearances:

David A. Kelly, Esquire (Monstream & May, L.L.P.),
Glastonbury, CT, for the Claimant

Lawrence W. Postol, Esquire (Seyfarth Shaw),
Washington, D.C., for the Employer and Carrier

DECISION AND ORDER ON REMAND AWARDING BENEFITS

I. Statement of the Case

This matter arises from claims for workers' compensation filed by Raymond F. Gerte (the Claimant) against Logistec of Connecticut, Inc. (the Employer) and Signal Mutual Indemnity Associations, Ltd. (the Carrier), under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the Act).

Claimant was injured in the course of his employment when he was struck in the head and face by a chain which snapped while hoisting a load of cargo on October 22, 1998. The Employer voluntarily paid compensation and medical benefits. However, a dispute subsequently arose over the payment of medical bills. The first claim, Case No. 2000-LHC-00209, was referred to the Office of Administrative Law Judges (OALJ) on October 4, 1999 to resolve the issue of full payment of medical bills. Pursuant to a motion by Employer, Administrative Law Judge David W. Di Nardi remanded the case to the district director on April 29, 2000 with instructions to add Dr. Lowlicht as a necessary party finding that "the sole issue herein is the doctor's dental bill in the amount of $9,424.63." On January 24, 2001, Claimant's counsel submitted a fee application requesting $4,174.00, representing 18.20 hours of legal services performed before Judge Di Nardi between September 21, 1999 and May 12, 2000 at the hourly rate of $195.00 and 12.50 hours of legal assistant services at the rate of $50.00 per hour. The Employer objected that it paid the full amount owed for Dr. Lowlicht's bill prior to referral to the OALJ and that the only additional benefits Claimant received were paid pursuant to the Connecticut Workers' Compensation Act. In his supplemental decision and order denying attorney fee, Judge Di Nardi found that Claimant's counsel did not obtain benefits for the Claimant under the Act other than those voluntarily paid by Employer. Furthermore, Judge Di Nardi denied Claimant's motion for reconsideration finding that Claimant's counsel did not offer any evidence that he obtained additional benefits for the claimant over those voluntarily paid by Employer and he also denied Claimant's request for a hearing on the issue.

Claimant appealed and the BRB issued its decision on the matter on April 22, 2002, remanding the case to the OALJ. *Gerte v. Logistec of Connecticut, Inc.*, BRB No. 01-0612 (April 22, 2002) (Unpublished). Specifically, the BRB directed that the administrative law judge develop a formal record to resolve a *bona fide* question of fact as to whether Claimant obtained benefits that Employer initially refused to pay or greater benefits than those voluntarily paid or tendered by Employer. *Id*. at 4. Due to the retirement of Judge DiNardi, the case was reassigned to the undersigned administrative law judge on August 9, 2002, and a hearing was held before me on October 15, 2002.

On October 18, 2002, a second claim, Case No. 2003-LHC-00161, was referred to the OALJ. Upon Claimant's motion, the claims were consolidated by order on November 26, 2002, and a second hearing was held before me on January 24, 2003. All parties were given the opportunity to present evidence and oral argument. Appearances were made by attorneys representing the Claimant and Employer/Carrier. Documentary evidence was admitted as administrative law judge's exhibits (ALJX) 1-97, Claimant's exhibits (CX) 1-37, and Employer's exhibits (EX) 1-47. The Claimant was the sole witness at both hearings. The testimony of Dr. Lowlicht was taken during a deposition conducted on January 10, 2003 and admitted as CX 16.

After careful analysis of the evidence contained in the record, I find that the Claimant is entitled to an award of attorney's fees pursuant to section 28(b) of the Act for having obtained greater benefits in Case No. 2000-LHC-00209 than voluntarily tendered by Employer, specifically the swift authorization and payment of the third surgery with Dr. Lowlicht on November 16, 1999. I further conclude that Claimant did not establish that he obtained other medical benefits which the Employer denied or refused to authorize and, therefore, he is not

entitled to an award of attorney's fees for these issues. I find that Claimant's average weekly wage should be calculated in accordance with section 10(a) of the Act. Lastly, I find that the Employer is entitled to a credit pursuant to section 3(e) of the Act in the amount it has paid to Claimant pursuant to the award of the Connecticut Workers' Compensation Commission. My findings of fact and conclusions of law are set forth below.

II. Issues Presented

The parties do not dispute that the Claimant suffered a work-related injury. However, there are several other issues that need to be resolved. First, the BRB has remanded Case No. 2000-LHC-00209 to determine whether Claimant obtained benefits that Employer initially refused to pay or greater benefits than those voluntarily paid or tendered by Employer[1] during the time period that the case was before Judge Di Nardi, October 4, 1999 through April 29, 2000. Second, the parties disagree as to whether Claimant obtained any other medical benefits which were refused by Employer. Third, the parties disagree about whether to use section 10(a) or (c) of the Act to calculate Claimant's average weekly wage. Fourth, the parties disagree about whether the Claimant is entitled to ongoing permanent partial disability compensation. Finally, the parties disagree on how to calculate the amount of the Employer's credit pursuant to section 3(e) of the Act for amounts awarded under the state workers' compensation award.

III. Discussion

A. Additional Benefits

Upon remand, the BRB directed that the administrative law judge (ALJ) determine whether Claimant obtained benefits that Employer initially refused to pay or greater benefits than those voluntarily paid or tendered by Employer. I will initially consider the issue as it relates to authorization and/or payment for Claimant's third surgery with Dr. Lowlicht in November 1999 and secondly whether Claimant obtained any additional benefits.

(1) Third Surgery with Dr. Lowlicht

Claimant's attorney argues that due to inadequate and untimely payments to Dr. Lowlicht for the first two surgeries it was necessary for counsel to intercede so as to enable the Claimant to obtain much needed medical treatment for his jaw, namely the third surgery in November 1999. Claimant's Brief at 4. He further asserts that he was involved in significant negotiations regarding the third surgery before Employer authorized it. *Id*. Claimant asserts that his efforts included seeking payment for Dr. Lowlicht through concurrent proceedings with the State of Connecticut Workers' Compensation Commission, whereby the Employer was eventually ordered to increase its payments to Dr. Lowlicht. *Id*.

[1] For the remainder of this decision and order, "Employer" will be used herein to refer to the Employer and the third party administrator acting on Employer's behalf, except where noted.

The Employer argues that it never contested Claimant's surgery with Dr. Lowlicht and, if there was any delay, it was caused by Dr. Lowlicht's silence. Employer's Brief at 36. Furthermore, Employer asserts that Claimant's counsel is not entitled to fees under the Act for work performed before the Connecticut Workers' Compensation Commission and, at most, may seek payment for services performed after October 21, 1999, when the Employer became aware of the need for the third surgery with Dr. Lowlicht. *Id*.

According to payment records, Employer paid Dr. Lowlicht for his treatment of the Claimant as follows: (1) for the first surgery performed on October 22, 1998, it paid $3,480.14 on February 26, 1999 (4 mos.); (2) for treatment on December 16, 1998, it paid $153.00 on March 25, 1999 (3.5 mos.); (3) for the second surgery performed on February 11, 1999, it paid $4,797.11 on September 23, 1999 (7.5 mos.); and (4) for the third surgery performed on November 11, 1999, it paid $11,650.00 on December 2, 1999 (3 wks.).[2] EX 13 at 2-5. The charges from Yale Faculty Practice Plan and Yale-New Haven Hospital for the third surgery on November 16, 1999 were not paid until March and February of 2000, respectively, 3-4 months after the date of service. EX 13 at 5.

Dr. Lowlicht testified in his deposition that the typical turn-around time for payment of his fees would be somewhere between thirty and ninety days, although he couldn't say whether seven months would necessarily be unusual in "some of these accident cases that get strung out with the attorneys and the insurance companies." CX 16 at 18. In regards to the third surgery, he testified that the insurance company initially wanted to pay less money than the materials would have cost him. CX 16 at 14. Furthermore, he stated that, as a result, his office spent time working with Attorney Kelly negotiating the approval of the third surgery. *Id*. Moreover, the record contains evidence that the Employer gave priority to authorizing and paying for the third surgery by Dr. Lowlicht in response to Attorney Kelly's efforts. For example, in a letter dated October 28, 1999, from Shaun Mundy of Lamorte Burns & Co., Inc. to Michael Horray of Signal Administration, Ms. Mundy discusses Attorney Kelly's contact with her regarding the litigation over unpaid bills, authorization for the third surgery with Dr. Lowlicht, and Dr. Lowlicht's proposed charges, and she attaches a letter from Attorney Kelly dated October 22, 1999 regarding these issues. EX 46 at 1-2. She concludes her letter by acknowledging Mr. Horray's efforts "to speed this process along" and requests that he "please stress to Integra that we need to make some decisions on this soon." *Id*. at 2. Furthermore, in an email to Liz Cook at the Integra Group on November 8, 1999, Ms. Mundy wrote "this is important as this matter is in litigation and this does need to take priority." EX 46 at 7. Ms. Cook responded that she had "internally flagged our claims department re: this fee negotiation." *Id*. at 8.

While the time frames for payments made to Dr. Lowlicht generally ranged from three and one-half months to more than seven months after the date of service, the Employer agreed to Dr. Lowlicht's fees for the third surgery in advance and made payment to him in a much shorter time frame, approximately three weeks after the date of service. The evidence establishes a

[2] Additionally, the chart indicates that the Employer paid Dr. Lowlicht $5,917.89 on August 7, 2000 with the same date of service listed. EX 13 at 5. However, this payment was presumably made in response to the decision and order of the Connecticut Workers' Compensation Commission issued August 2, 2000, which ordered the Employer to pay $5,917.89 to Dr. Lowlicht in accordance with the Connecticut Practioners Fee Schedule for surgeries performed on October 22, 1998 and February 11, 1999.

direct link between the Employer's quick authorization and payment for the third surgery to Attorney Kelly's efforts to pursue the matter on his clients' behalf. Attorney Kelly's efforts succeeded in speeding up the process significantly. Based on the foregoing, I find that by securing prompt authorization and payment of the third surgery through agreement with the Employer before a hearing, the Claimant has obtained additional compensation within the meaning of section 28(b) of the Act. *See Revoir v. General Dynamics Corp.*, 12 BRBS 524, 525 (1980). Accordingly, I find that the Claimant obtained greater benefits than those voluntarily paid or tendered by the Employer. *McCloud v. George Hyman Constr.Co.*, 11 BRBS 194 (1979).

(2) Other Medical Benefits

Claimant asserts that even though the Employer accepted his injuries, some treatment has not been authorized despite it being recommended by Claimant's treating physicians. Claimant's Brief at 11-12. Specifically, Claimant argues that the following treatment recommended by Dr. Katz has not been authorized: an unsupervised rehabilitation program through a gym membership; continued TMJ treatment with Dr. Richards; psychological counseling for post-traumatic stress syndrome; and physical therapy with Dr. Kudej. *Id.* In addition, Claimant contends that Dr. Horblitt has indicated that an annual cleaning of Claimant's implants is necessary and that Dr. Lowlicht recommends a final evaluation with him. *Id*.

The Employer, however, responds that it authorized and paid for the medical care of Dr. Horblitt, Dr. Katz, Bridgeport Physical Therapy, and Dr. Gang. Employer's Brief at 38. Furthermore, Employer responds that all of these providers acknowledged there were no outstanding medical bills, except for Dr. Horblitt who refused to communicate with Employer. *Id*. The Employer contends that there are "only three real issues" regarding medical care: the gym membership; Dr. Kudej's care; and Dr. Richards' care. *Id*. at 39.

A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). The BRB has held that Section 20(a) is applicable to medical bills. *Jenkins v. Maryland Shipbuilding & Dry Dock Co.*, 6 BRBS 550, 555 (1977), *rev'd on other grounds*, 594 F.2d 404 (4th Cir. 1979). The employer must raise the reasonableness and necessity of treatment before the ALJ. *Salusky v. Army Air Force Exch. Serv*., 3 BRBS 22, 26 (1975). Employer is only liable, however, for the reasonable value of medical services. *See* 20 C.F.R. § 702.413; *Bulone v. Universal Terminal & Stevedoring Corp*., 8 BRBS 515, 518 (1978); *Potenza v. United Terminals, Inc.*, 1 BRBS 150 (1974), *aff'd*, 524 F.2d 1136 (2d Cir. 1975).

(a) Gym Membership

The Claimant argues that on January 11, 1999 Dr. Katz prescribed a gym membership, which the Employer refused to authorize on February 10, 1999. CX 19 at 1-4. The Employer, on the other hand, asserts that "to the extent the gym membership can be considered medical care, it is physical therapy," which it had already authorized for the Claimant at Bridgeport Physical Therapy. Employer's Brief at 39. Dr. Katz noted his recommendation for a gym

membership for the Claimant in his office visit notes on January 11, 1999. CX 28 at 11. In a letter to Attorney Kelly, dated August 21, 2000, Dr. Katz again reiterated his opinion that the Claimant should undergo an unsupervised rehabilitation program for muscle stretching and strengthening to both the cervical and lumbosacral regions and that a gym membership with swimming pool facilities would fit this criteria. CX 28 at 1. However, in a letter and questionnaire dated January 7, 2003 from the Employer, Dr. Katz answered "yes" when asked whether the Employer adequately responded to the unsupervised gym membership requirement with the authorization of supervised physical therapy. EX 25. Given Dr. Katz's affirmative response to the Employer's question, his opinion that the Claimant required an unsupervised rehabilitation program including a gym membership is at best equivocal. For that reason, I find that the Claimant has not met his burden of establishing a *prima facie* case that the gym membership is compensable medical treatment for his work-related injury.

(b) Treatment with Dr. Richards

The Claimant asserts that he was referred to Dr. Richards for temperomandibular joint (TMJ) treatment by Dr. Katz, and although the Employer initially authorized this treatment, it later refused to continue it. Claimant's Brief at 12. The Employer asserts that further treatment with Dr. Richards is unnecessary because her diagnosis was wrong.[3] Employer's Brief at 40. Dr. Katz's office note dated April 6, 2000 verifies that he referred the Claimant to Dr. Richards for "TMJ pathology." CX 28 at 2. Claimant had an initial examination with Dr. Richards on May 30, 2000, at which time she diagnosed "TMJ traumatic Arthropathy" and recommended acupuncture, and a magnetic resonance imaging scan (MRI) to evaluate TMJ disc injury. CX 31 at 8. On July 26 and 27, 2000, the Employer faxed its approval to Dr. Richards for ten acupuncture treatments and twelve nerve blocks. *Id*. at 12, 17. Dr. Richards' records indicate that the Claimant received treatment from her as approved through November 2001. CX 31. During visits with Dr. Richards, the Claimant completed pain charts before and after treatment, which indicated that his pain lessened to some degree immediately following treatment. CX 31. The Claimant also testified that his pain lessened at least temporarily after treatment with Dr. Richards. TR 281:14-284:16. In addition, on November 15, 2001, the Claimant completed a form regarding his remaining symptoms where he noted that treatment with Dr. Richards has "helped me greatly for the pain in my jaw and face also for my neck and lower back." *Id*. at 44.

On November 15, 2001, Dr. Richards prescribed an MRI of the right and left "temperomandibular joints if not done previously." *Id*. at 43. On January 8, 2002, Dr. Richards submitted a final report to Attorney Kelly stating that the Claimant had reached maximum medical improvement and opining that the Claimant will require monthly maintenance treatments of acupuncture or nerve blocks in order not to worsen. *Id*. at 53-54. Dr. Richards further opined that the Claimant had a 5% impairment of his nervous system and a 10% impairment of his jaw function and again noted the need for an MRI, if not already done. *Id*. By letter to the Employer on February 12, 2002, Dr. Richards requested an additional six nerve block treatments and six medical acupuncture treatments in order to prevent a regression of his

[3] Dr. Richards is trained as a medical doctor and a dentist, specializing in treatment of TMJ through the use of acupuncture and nerve blocks. ALJ 97. The Employer initially authorized Dr. Richards' treatment of the Claimant's TMJ condition and has not challenged her qualifications during the hearing or in its brief. Therefore, I find that Dr. Richards is a qualified physician within the meaning of 20 C.F.R. § 702.404.

symptoms. CX 51-25. Based on the foregoing, I find that the Claimant has established a *prima facie* case that ongoing treatment with Dr. Richards is compensable medical treatment recommended by a qualified physician.

The Employer responds that continued treatment with Dr. Richards is not necessary and offers two independent medical opinions to rebut the Claimant's assertions. An independent medical examination (IME) was completed by Dr. Skope on September 22, 2002, and by Dr. Sella on December 13, 2002. Leonard Skope, D.D.S. maintains a private practice in oral and maxillofacial surgery and is a clinical professor at Yale School of Medicine, Department of Surgery. EX 18. Dr. Skope opined that a diagnosis of compound fracture of mandible, maxillary alveolar fracture, laceration of the lower lip, dental trauma, myofascial pain dysfunction syndrome was initially likely. *Id*. at 4. He further opined that the Claimant underwent treatment for these conditions which resulted in loss of teeth, residual numbness of the lower lip and chin area and persistent temperomandibular joint syndromes. *Id*. He concluded that "it appears the patient's treatment to date has been reasonable and within the Parameters of Care." *Id*. Dr. Skope agreed that the Claimant had reached maximum medical improvement and opined that any further treatment for temperomandibular joint will be palliative and not curative and he saw no benefit in obtaining an MRI of the TMJ at this time. *Id*. He further agreed that the 10% jaw impairment rendered by Dr. Richards appeared reasonable, but he was uncertain as to how she arrived at the 5% nervous system rating conceding that neural losses were not within his area of expertise. *Id*. In a follow-up letter, dated December 26, 2002, Dr. Skope again opined that his evaluation of the Claimant's condition did not suggest any internal joint derangement of the Claimant's jaw and therefore an MRI would be of no benefit in managing the patient's condition. EX 17. Furthermore, he noted that acupuncture and/or nerve blocks have not been found to be curative or of long term benefit in the management of problems such as those suffered by the Claimant, that the Claimant had reported only brief periods of relief following treatment by Dr. Richards, and that there's no evidence that that continued treatment would be curative versus palliative. *Id.* He did acknowledge that acupuncture and nerve blocks are modalities used in the management of chronic pain syndrome. *Id*. Lastly, in a letter dated January 31, 2003, Dr. Skope reiterated his opinion that an MRI was not necessary for continued treatment. EX 50 at 2. Despite this, the Employer ultimately authorized an MRI on March 5, 2003, which indicated "a normal appearance and position of the bilateral TMJ articular discs in the closed and open mouth positions." EX 52.

The Employer obtained a second IME with Enzo J. Sella, M.D., F.A.C.S., F.A.A.O.S., on December 13, 2002. Dr. Sella is an orthopaedic surgeon and clinical professor of Orthopeadics & Rehabilitation at Yale University. EX 20. He diagnosed the Claimant with musculoligamentous sprain strain syndrome cervical spine, chronic and musculoligamentous sprain strain syndrome of cervical spine, chronic. EX 19 at 3. Dr. Sella notes that the Claimant's severe injuries to his face were treated satisfactorily by the appropriate doctors. *Id*. at 3. He further noted that the Claimant continues to complain of symptoms related to soft tissue injuries to the cervical and lumbar spine consisting primarily of muscle and ligament type of injuries. *Id*. He described the resulting symptoms as chronic, mild and persistent. *Id*. He opined that organized structured physical therapy or chiropractic treatments are not likely to relieve the symptoms but recommended that the Claimant "should be encouraged to live with the symptoms, stay physically active as much as possible," apply home remedies such as moist heat or hot

baths, and take over the counter nonnarcotic analgesics. *Id*. He also noted that the Claimant is "visibly depressed and would be helped by psychological counseling and perhaps medication to relieve his depression which will also go a long way in relieving his subjective physical symptoms." *Id*. Lastly, the Employer offers a questionnaire dated January 23, 2003 completed by Dr. Katz in which he responded "yes" when asked if he agreed with Dr. Sella that the Claimant does not currently need any further acupuncture with Dr. Richards. EX 49 at 1.

While all medical reports concur that the Claimant continues to suffer chronic symptoms, they differ in how to treat these. Dr. Richards recommends continuing acupuncture and nerve block treatment. Dr. Skope acquiesces that acupuncture and nerve blocks are used in pain management and that the Claimant reports at least temporary relief from his symptoms after treatment by Dr. Richards. Dr. Sella recommends home remedies such as moist heat and hot baths as well as over the counter non-narcotic analgesics to treat the Claimant's symptoms. The fact that treatment may be only palliative and not curative does not prevent an employer from being liable if the expense is reasonable and necessary. *Slade v. Coast Engineering & Manufacturing Co*., (BRB Nos. 98-646 & 98-646A)(Feb. 2, 1999) (Unpublished). However, Dr. Katz, who originally referred the Claimant for TMJ treatment, has since agreed with Dr. Sella that no further acupuncture is necessary. In addition, the MRI obtained in March 2003 was normal showing no signs of TMJ. Moreoever, I note that the Claimant has successfully returned to work and is managing his symptoms well enough to do so without the assistance of further treatment from Dr. Richards. Based on the foregoing, I find that the Employer has successfully rebutted Claimant's contention that continued treatment with Dr. Richards is necessary and reasonable. Furthermore, I conclude that Claimant has not established by a preponderance of the evidence that continued treatment with Dr. Richards constitutes necessary and reasonable medical treatment.

(c) Dr. Kudej's treatment

Claimant asserts that Dr. Katz referred him to Dr. Kudej for physical therapy and that the Employer has refused to authorize this. Claimant's Brief at 12. Employer responds that Dr. Kudej is a chiropractor and since Claimant does not have subluxation of the spine, he is not entitled to chiropractic care under the Act. Employer's Brief at 39-40. In the alternative, Employer responds that if Dr. Kudej's care is for physical therapy, which has been authorized, a change of medical provider from Bridgeport Physical Therapy to Dr. Kudej must be approved pursuant to 20 C.F.R. § 702.406 by the Employer or the Office of Workers' Compensation Programs (OWCP), neither of which have done so. *Id*. at 40.

Initially, I note that Dr. Kudej is a registered physical therapist and a chiropractor. CX 29. The Employer correctly asserts that chiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings. 20 C.F.R. § 702.404. Dr. Sella and Dr. Katz have opined that the Claimant did not have sublaxation of the spine. EX 48 at 1; EX 25 at 1. Furthermore, Dr. Katz has opined that he did not prescribe additional physical therapy for the Claimant and agreed with Dr. Sella that no more physical therapy is needed. EX 26 at 1. Noting that there is no evidence that the Claimant has subluxation of the spine and that Dr. Katz is no longer recommending additional physical therapy for the Claimant, I find that the Claimant has not met his burden of establishing

that either chiropractic or physical therapy treatment with Dr. Kudej is compensable medical treatment.

(d) Dr. Gang

The Claimant alleges that psychiatric treatment with Dr. Gang was delayed from the first evaluation on March 12, 1999 until July 26, 1999. Claimant's Brief at 7. Employer responds that treatment with Dr. Gang has always been authorized. Employer's Brief at 29. During the hearing on this matter, the parties stipulated that treatment by Dr. Gang was authorized. TR 238:1-8. Furthermore, in a letter to Attorney Postal, dated January 3, 2003, Dr. Gang admitted that the insurance company's response to requests for visits with the Claimant has been good. CX 27; EX 22. Accordingly, I find that the Claimant has not demonstrated that the Employer refused to authorize or pay for psychiatric treatment with Dr. Gang or that he obtained greater benefits than Employer voluntarily paid.

(e) Dr. Horblitt

The Claimant maintains that annual examinations and cleanings by Dr. Horblitt are necessary. Claimant's Brief at 12. The Employer maintains that it has authorized, paid for, and will continue to authorize and pay for reasonable and necessary treatment with Dr. Horblitt according to the OWCP fee schedule. Employer's Brief at 39. There is no evidence in the record that the Employer has refused to authorize or pay for reasonable and necessary treatment with Dr. Horblitt. Therefore, I find that Claimant has not established that the Employer has denied treatment with Dr. Horblitt or that he obtained greater benefits than Employer voluntarily paid.

(f) Other medical bills including prescriptions and mileage reimbursement

The Claimant contends that several other medical providers experienced difficulty in obtaining payment from the Employer and that at least one provider, Yale-New Haven Department of Dentistry, placed the Claimant's account into collection status. Claimant's Brief at 6-7. In addition, Claimant asserts that Employer delayed reimbursement for prescriptions and mileage. *Id*. The Employer responds that all bills from medical providers for authorized treatment were paid once they were received. Employer's Brief at 38-39. The regulations require that whenever an employer acquires knowledge of an employee's injury through receipt of a written notice or otherwise, said employer shall forthwith authorize, in writing, appropriate medical care. 20 C.F.R. § 702.419. The spreadsheet documenting payments made by the Employer to the Claimant and to his medical providers reveals that payments were made at various times. EX 13; CX 5. However, these documents do not list the dates on which the bills or requests for reimbursement were received by the Employer. Furthermore, the Claimant acknowledged that he submitted medical bills and requests for reimbursement to his attorney and not directly to Employer or its third party administrator. TR 119:23-25, 120:1-13. Claimant's counsel appears to have acted as an intermediary between the Claimant and the Employer for the processing of these bills. Yet, there is no evidence that the Employer initially refused to pay these bills and no evidence that the amounts billed were disputed similar to the dispute between the Employer and Dr. Lowlicht. Moreover, as Employer asserts, the medical providers have

signed statements that they have been paid and have no outstanding bills. EX 22-24, 30-32. There is no evidence that the Employer was likely to contest or deny payment of these bills and requests for reimbursement. In my view, forwarding routine bills and requests for reimbursement to the Employer is a function which is clerical in nature and does not require the services of an attorney. Therefore, I conclude that the Claimant has not established that legal assistance was necessary to obtain payment of these routine medical bills and reimbursements.

Based on the foregoing, I conclude that the Claimant has not established that he obtained any benefits which the Employer initially refused to pay or greater benefits than those voluntarily paid or tendered by the Employer, during all relevant time periods, with the exception of prompt authorization and payment for the third surgery with Dr. Lowlicht.

B. Average Weekly Wage

Although the parties agree on the amount Claimant earned during the year preceding his injury, they disagree on how to calculate the average weekly wage and the resulting compensation rate. Claimant asserts that section 10(a) of the Act should be applied to calculate his average weekly wage and compensation rate, since he worked "substantially the whole year" or 248 out of 260 days (95%) of the year preceding his injury. Claimant's Brief at 17; CX 17. As a result, Claimant seeks a compensation rate of $681.00 per week based upon an average weekly wage of $1,021.50. Claimant's Brief at 17-18. In support of his argument, the Claimant has offered copies of his payroll records for the relevant time periods, which include the dates paychecks were issued, the number of hours worked and the amounts paid. CX 17. The last column of the payroll records contains handwritten numbers which Claimant testified are accurate estimates of the number of days worked during the corresponding week. TR 252:4-10.

The Employer, on the other hand, paid a compensation rate of $649.58 a week based upon an average weekly wage of $649.58 calculated by dividing the Claimant's earnings of $50,667.23 in the year preceding his injury by fifty-two in accordance with section 10(c) of the Act. Employer's Brief at 41. The Employer argues that Claimant has not supplied any evidence to demonstrate the number of days a week he actually worked. *Id*. In addition, Employer argues that the Claimant, like all Longshore workers, can work 4 hours one week and 50 the next, and therefore he cannot be classified as a five, six or seven day a week worker. *Id*.

Section 10(a) applies if the employee "worked in the employment ... whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991)(*Gatlin*); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 135-36 (1990)(*Duncan*). Both the nature of the claimant's work and the amount of time worked must be balanced in making that determination. *Duncan*, 24 BRBS at 136. Section 10(c) should be used whenever Sections 10(a) or 10(b) cannot reasonably and fairly be applied and therefore do not yield an average weekly wage that reflects the claimant's earning capacity at the time of the injury. *Gatlin*, 936 F.2d at 823; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991).

In the present case, the Claimant offered payroll records of earnings during the year preceding his injury and the Employer has not contested the accuracy of these records. Although the payroll records did not indicate the actual number of days the Claimant worked, Claimant credibly testified that he was able to estimate the number of days he worked per week based on his earnings for that week. The Employer, on the other hand, had full access to all payroll records involving the Claimant and has not offered any evidence to rebut the Claimant's testimony. Moreover, the Employer has not demonstrated that application of section 10(a) would produce harsh results. Accordingly, I conclude that section 10(a) of the Act applies to calculating Claimant's average weekly wage and compensation rate. Claimant's earnings for the year preceding his injury were $50,667.23 and he testified that he worked 248 days out of 260. The daily average wage ($204.30) is calculated by dividing $50,667.23 by 248. The average weekly wage for a five day a week worker is calculated by multiplying the average daily wage ($204.30) by 260 and then dividing by 52. The compensation rate is then two-thirds of that figure. Applying these calculations, I conclude that the Claimant's average weekly wage is $1,021.50, and his compensation rate is $681.00 a week.

C. Permanent Partial Disability

Claimant contends that he has missed work on an intermittent basis due to his compensable injuries and is therefore entitled to an award of ongoing permanent partial disability compensation pursuant to section 8(c)(21) of the Act. Claimant's Brief at 18-19. He asserts that he requested attendance records from Employer which would support his contention, but the Employer only supplied annual earning records for 2000-2002. *Id*. The Claimant contends, though, that these earning records demonstrate that he earned less money in those years than he did prior to his injury. *Id*. at 19. The Employer responds that although Claimant mentioned the issue of permanent partial disability in his answer to interrogatories, Claimant did not raise this issue at hearing. Employer's Brief at 38.

When questioned about how many days of work he missed due to his injuries after returning to work full time, the Claimant responded "I couldn't say, maybe once a month or maybe, you know, less." TR 256:6-7. He further testified that he did not see a doctor or obtain a note for those particular days. TR 256:1-3. Claimant admitted on cross-examination that he didn't have an accurate record of the days he missed and some of the days may be due to personal reasons. TR 277:14-25. I find that Claimant's vague testimony and a comparison of his pre-injury and post-injury annual wages provide an insufficient factual basis to determine with any certainty which days Claimant missed work due to his injuries. Accordingly, in the absence of evidence demonstrating the actual number of days Claimant was out of work due to his injuries, I find that Claimant has not met his burden of establishing that he is entitled to any ongoing permanent partial disability compensation.

D. Compensation and Interest Due

Claimant was paid a compensation rate of $649.58 per week. Because I have concluded that his compensation rate should be $681.00 per week, I further find that he has been underpaid by $31.42 per week. Claimant received temporary total disability benefits for the following periods: (1) from October 23, 1999 through May 27, 1999 (31 weeks); (2) from July 8, 1999

through November 24, 1999 (20 weeks); and (3) from May 24, 2000 through May 29, 2000 (.857 weeks). Claimant was underpaid in each of the corresponding time periods by the following amounts: (1) $974.02, (2) $628.40, and (3) $26.93. As a result, I conclude that Claimant is entitled to an additional $1,629.35 in past due compensation payments.

Since the Claimant's compensation payments are overdue, interest will be added to all unpaid amounts. *Adams v. Newport News Shipbuilding & Dry Dock Co*., 22 BRBS 78, 84 (1989). The appropriate interest rate is the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982) which is periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). My order incorporates 28 U.S.C. § 1961 by reference and provides for its specific administrative application by the district director, OWCP. The appropriate rate shall be determined as of the filing date of this decision and order with the district director.

E. Section 903(e) Credit

The Claimant concedes that the Employer is entitled to a credit pursuant to section 903(e) of the Act for the specific award under the State of Connecticut Workers' Compensation Act, but he disputes the manner in which the Employer has set forth its claim for a credit. Claimant's Brief at 22. Specifically, Claimant contends that the Employer should have paid him the entire amount of the specific state award ($18,705.84) then taken a credit for any payments that he may become entitled to pursuant to section 908(c)(21). *Id*. Claimant also asserts that the Employer failed to respond to his request for an explanation of the calculations used by the Employer in determining any alleged credit, namely $3,400.35 as listed on Employers' LS-208, EX 42. Claimant's Brief at 22. Employer responds that it is entitled to a credit pursuant to section 903(e) of the Act for the amount of payments made to the Claimant under the Connecticut state award. Employer's Brief at 41-42.

The BRB has held that an employer liable for benefits under the Act is entitled to a credit pursuant to Section 3(e) "against benefits the claimant receives under another workers' compensation law for the same injury." *Redmond v. Sea Ray Boats, Inc.*, 32 BRBS 1, 2 (1998). The parties do not dispute that the Employer has paid $15,305.49 in compensation to the Claimant for the same injury pursuant to the Connecticut award, but Claimant does challenge the Employer's calculations involving the $3,400.35 credit pursuant to *McGowan v. General Dynamics Corp.*, 15 Conn. App. 615 (1988), *aff'd*, 210 Conn. 580 (1989). I conclude that the Employer is entitled to a credit pursuant to section 3(e) of the Act in the amount of $15,305.49, the amount which Employer has paid to the Claimant under the Connecticut award. 33 U.S.C. § 903(3). However, Claimant's allegation that Employer has miscalculated and misapplied a state-sanctioned credit to the state award is a matter for the state to decide, and I thus find that this issue is beyond the jurisdiction of this Court.

F. Attorney's Fees

As a result of obtaining additional benefits, specifically the prompt authorization and payment of the third surgery with Dr. Lowlicht, Claimant is entitled to an award of attorney's

fees pursuant to section 28(b) of the Act for the time period the claim was before Judge Di Nardi. 33 U.S.C. § 928(b). I have reviewed Attorney Kelly's fee application for the relevant time period. I will allow charges for services related to the issue of the third surgery with Dr. Lowlicht between October 4, 1999, when the claim was referred to the OALJ, and December 2, 1999, when Dr. Lowlicht was paid for the surgery. However, since no additional benefits were obtained on the first claim, I disallow the remaining charges, including time spent pursuing additional fees for Dr. Lowlicht under the state workers' compensation act. Upon consideration of the foregoing and taking into account the quality of representation, the complexity of the legal issues involved, and the amount of the benefits obtained, I conclude that an attorney's fee in the amount of $614.75, representing 3.05 hours at $195.00 per hour for Attorney Kelly's services and .40 hours at $50.00 per hour for legal assistant services, is reasonably commensurate with the necessary work done.

In addition, having successfully obtained additional compensation through an increase in Claimant's average weekly wage and compensation rate, the Claimant is entitled to an award of attorney's fees under Section 28(b) of the Act. *See Bacon v. General Dynamics Corp*., 14 BRBS 408, 411 (1981). Since no fee application for this issue has been filed, Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and the Employer/Carrier shall have 15 days thereafter within which to file any objection.

G. Conclusions

In sum, I find that the Claimant obtained additional benefits through the prompt authorization and payment of the third surgery with Dr. Lowlicht on November 16, 1999 and is entitled to an award of attorney's fees. I find that $614.75 is a reasonable amount for the legal services associated with obtaining this benefit. Furthermore, I find that Claimant's average weekly wage shall be determined in accordance with section 10(a) of the Act, which results in an average weekly wage of $1,021.50 and a compensation rate of $681.00. I find, however, that Claimant has produced insufficient evidence to establish entitlement to ongoing permanent partial disability compensation. In view of the fact that Claimant was underpaid during the three periods of temporary total disability, he is entitled to additional compensation in the amount of $1,629.35 plus interest. Lastly, I find that Employer is entitled to a credit pursuant to section 3(e) of the Act for the amount of compensation paid to Claimant pursuant to the state award in the amount of $15,305.49.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law and upon the entire record, the following order is entered:

(1) Signal Mutual Indemnity Association, Ltd. as the responsible carrier for Logistec of Connecticut, Inc., shall pay to Claimant's attorney, David A. Kelly, attorney's fees in the amount of $1,629.35;

(2) Signal Mutual Indemnity Association, Ltd. shall pay to the Claimant, Raymond F. Gerte, temporary total disability compensation payments at the rate of $681.00 a week from

October 23, 1999 through May 27, 1999 (31 weeks), from July 8, 1999 through November 24, 1999 (20 weeks), and from May 24, 2000 through May 29, 2000 (.857 weeks), subject to a credit for all temporary total disability compensation voluntarily paid to the Claimant for said period;

(3) Signal Mutual Indemnity Association, Ltd. shall pay to the Claimant interest on all past due compensation at the Treasury Bill rate applicable under 28 U.S.C. § 1961 (1982), computed from the date each payment was originally due until paid;

(4) The Employer and/or Carrier shall be allowed a credit pursuant to 33 U.S.C. § 903(e) for all amounts paid to the Claimant under other workers' compensation law;

(5) Signal Mutual Indemnity Association, Ltd. shall continue to provide for all medical care reasonably and necessarily incurred by the Claimant as a result of the work-related injury of October 22, 1998;

6. The Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and the Employer/Carrier shall have 15 days thereafter within which to file any objection;

7. All computations of benefits and other calculations provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

DFS:psb